...RARY
...RT, U. S.
Supreme Court, U. S.
FILED
AUG 6 1974
MICHAEL RODAK, JR., CLERK

No. 74-84

In the Supreme Court of the United States

OCTOBER TERM, 1974

JEROME F. MILES and BERNICE MOORE, Individually and on behalf of all others as a class similarly situated,

Petitioners,

vs.

THE PULLMAN COMPANY, a corporation; BROTHERHOOD OF SLEEPING CAR PORTERS, an International Union; and CHICAGO DIVISION OF BROTHERHOOD OF SLEEPING CAR PORTERS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ARTHUR D. SCHAFFER
ROBERT J. WIEFERICH
1133 15th Street N.W.
Washington, D.C., 20005

JOHN A. McELLIGOTT
111 West Washington Street
Suite 1445
Chicago, Illinois 60602
(312) 332-5800
Attorneys for Petitioners

Of Counsel:
SIDNEY Z. KARASIK
135 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0588

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

INDEX

PAGE

Opinion Below ..... 2, App. A. 1

Jurisdiction 2

Questions presented 2

Statutes involved 3, 4, 7, 14

Statement 3

Reasons for granting writ 7

I. Plaintiffs are denied their right of access to the U.S. District Court to enforce legal remedies exclusively vested in that court by the Seventh Circuit's unwarranted extension of the "exhaustion-of-administrative remedies" rule 7

II. The Seventh Circuit's judgment is in direct conflict with the decisions of this Court in *Glover* v. *St. Louis-San Francisco Ry. Co.*, *Czosek* v. *O'Mara*, and other cases 9

III. The decision of the Seventh Circuit is in conflict with those of other Circuits 15

IV. Certiorari should be granted in exercise of this Court's supervisory powers to curb the excessive number of unpublished disposition orders entered by the Seventh Circuit under its local rule No. 28 17

Conclusion 20

Appendices

A. Unpublished judgment order of Court of Appeals ..... App. 1

PAGE

B. Order of Court of Appeals denying rehearing App. 7

C. Summary of complaint and history of litigation ..... App. 8

TABLE OF AUTHORITIES

Cases

Andrews v. Louisville and Nashville Ry. Co., 406 U.S. 320 9

Conley v. Gibson, 355 U.S. 41 ..... 9, 11, 12, 13, 15

Cunningham v. Erie Ry. Co., 266 F.2d 411 (2d Cir. 1959) 14, 15

Czosek v. O'Mara, 397 U.S. 25 ..... 2, 6, 9, 11, 13, 14, 19

DeBoles v. TWA., Inc., 350 F. Supp. 1274 (DC.Pa, 1972) 16

Glover v. St. Louis-San Francisco Ry. Co., 393 U.S. 324 ..... 2, 6, 9, 11, 13, 14, 18, 19

Humphrey v. Moore, 375 U.S. 335 (1964) 14

Richardson v. Texas N.O.R.Co. 241 F 2d 230 (5th Cir. 1957) 14

Rumbaugh v. Winifrede, 331 F.2d 530 (4th Cir. 1964) .. 14

Steele v. Louisville & Nashville Ry. Co., 323 U.S. 192 .. 11, 14, 15

Thompson v. Brotherhood of Sleeping Car Porters, 316 F. 2d 191 (4th Cir. 1963) 14

Tunstall v. Brotherhood of Locomotive Firemen & Engineers, 323 U.S. 210 ..... 11, 14

Vaca v. Sipes, 386 U.S. 171 12

Statutes

PAGE

28 U.S.C. §1337 ..... 3, 15

45 U.S.C. §153 First (Railway Labor Act) 3, 4, 7, 14

Rule

Circuit Rule 28, Seventh Circuit 3, 17

Miscellaneous

The Judicial Business of the United States Courts of The Seventh Circuit, Annual Report, 1973 18

In the Supreme Court of the United States

OCTOBER TERM, 1974

No.

JEROME F. MILES and BERNICE MOORE, Individually and on behalf of all others as a class similarly situated,

Petitioners,

vs.

THE PULLMAN COMPANY, a corporation; BROTHERHOOD OF SLEEPING CAR PORTERS, an International Union; and CHICAGO DIVISION OF BROTHERHOOD OF SLEEPING CAR PORTERS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners pray that a WRIT OF CERTIORARI issue from this Court to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The judgment of the Court of Appeals, entered May 8, 1974, is reprinted as Appendix "A" post, as an "unpublished order, not to be cited per Circuit Rule 28". Petition for rehearing was denied on May 28, 1974 and the order denying same is reproduced as Appendix "B" post.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether a class action complaint against a labor union (for breach of duty of fair representation) and an employer (for breach of a collective bargaining agreement) charging a common law conspiracy between the union officials and the employer to deprive the class plaintiffs of severance pay rights guaranteed by the collective bargaining agreement, is cognizable in a Federal District Court, or was exclusively referable to a Public Law Board under the provisions of the Railway Labor Act (45 U.S.C. §153 first (i))? Whether the judgment of the Seventh Circuit is in direct conflict with this Court's decisions in *Glover* v. *St. Louis-San Francisco Ry. Co.*, 393 U.S. 324 and *Czosek* v. *O'Mara*, 397 U.S. 25?

2. Whether the supervisory powers of this Court should be exercised to curb the practice by the Seventh Circuit of disposing of important jurisdictional questions by the expedient of entering unpublished dispositive orders, pursuant to local rule, which serve as no guide to litigants in other cases involving identical issues of wide interest and concern and greatly impair the accountability of the Court in such matters?

3. Whether the judgment of the Seventh Circuit is in conflict with decisions of other circuits?

STATUTES INVOLVED

28 U.S.C. §1337;

45 U.S.C. §153 First (Railway Labor Act);

Circuit Rule 28. Seventh Circuit (quoted infra).

STATEMENT

This was a class action complaint, filed under Rule 23 of the Fed. Rules Civ. Pred. by a Pullman car porter and a widow of a Pullman car porter, on behalf of themselves and all others similarly situated. The plaintiffs' class consists of approximately 1150 sleeping car porters and their heirs.

The amount in controversy is alleged to exceed $1,000,000 and the requisite grounds for Federal jurisdiction are pleaded as to each member of the class.

Since the statement of the facts in the Court of Appeals judgment order (App. A. *post*) is too skimpy and incomplete to furnish an understanding of the issues involved in the instant litigation, the essential allegations of the complaint and supporting exhibits are summarized in App. C, *post.*

The essence of the complaint was that the individual and class plaintiffs were wrongfully cheated and deprived of severance, transfer or separation pay which was guaranteed to them under a certain collective bargaining agreement between their employer and labor union. That agreement was made in contemplation of the cessation of Pullman sleeping car service on December 31, 1968, after which date sleeping car service was to be assumed by some 52 individual railroads.

The complaint alleges that in addition to the openly promulgated collective bargaining agreement there was a private, secret, side-letter agreement between the Pullman Company and the Union, of which plaintiffs were kept ignorant. The Complaint alleges that the clandestine side-letter was designed to qualify and restrict the severance pay benefits promised in the explicit, published agreement made for the benefit of the sleeping car porters.

The theory of the action against the Pullman Company was a breach of the collective bargaining agreement. Against the labor union, and its local, the charge was the violation of its duty of fair representation free of "hostile discrimination" and a breach of the fiduciary obligation owed to the plaintiff members by the Union and its officials.

The complaint alleged that Pullman and the Union colluded and conspired to deprive the individual and class plaintiffs of their separation and other rights, which collusion was exemplified by the aforesaid secret side-letter.

The complaint alleged the absence of any adequate adminstrative procedures for determining plaintiffs' rights under their severance pay agreement and the futility and impracticability of invoking the grievance procedures of the Railway Labor Act. (45 U.S.C. §153 First (i)). The complaint prayed for actual and punitive damages, a declaration of the plaintiffs' rights under the collective bargaining agreement with the Pullman Company, the creation of a severance pay fund and the appointment of a trustee to administer the payments from said funds.

The trial court initially granted the motion of the Pullmany Company to dismiss on the ground that plaintiffs had not exhausted their administrative remedies through the grievance procedure of the National Railroad Adjustment Board of the Railway Labor Act.

The trial court, however, ruled that the action could proceed against the labor union defendants.

Thereafter, the trial court held (even though each and every criteria of Rule 23 was satisfied) that the complaint could not be maintained as a class action with respect to the remaining defendants and set the matter for trial on the claims of the individual plaintiffs.

On the date of trial, counsel for plaintiffs moved for a continuance, supported by his affidavit, that both plaintiffs, residents of Washington, D.C., were too ill to come to Chicago for the trial. The affidavit was supported by a statement from a physician that one of the plaintiffs had recently undergone major surgery and would be unable to leave his home for several months.

The trial judge denied the request for the continuance and dismissed the action for want of prosecution.

On appeal plaintiffs sought review of the trial court's piece-meal disposition of the complaint, namely, the initial dismissal of the Pullman Company, the ruling that the action could not be maintained as a class action and finally the dismissal for want of prosecution.

The Court of Appeals, in an unpublished order, construed the collective bargaining agreement and the side-letter (without regard to the critical fact that the side-letter had been secret and not binding upon plaintiffs). The court ruled that plaintiffs were not "protected employees" within the meaning of the severance pay agreement and that the facts supported the District Court's dismissal of the complaint as to Pullman. The Court of Appeals held that since "only" an interpretation of a collective bargaining agreement was involved, such dispute had to be sub-

mitted for "final and binding resolution in accordance with the provisions of section 3 of the Railway Labor Act as Amended" and that the Complaint "failed to state a claim for relief against the union defendants." (App. A., pp. 5-6).

Ignoring the holdings of this Court in *Glover* v. *St. Louis-San Francisco Railway Co.*, 393 U.S. 324, and *Czosek* v. *O'Mara*, 397 U.S. 25, the Court of Appeals refused to consider the impropriety of fragmentizing the joint cause of action against the employer and union; overlooked the allegations as to conspiracy between the employer and the union; ignored the allegations of the complaint that resort to administrative remedies were futile and impracticable since the union defendants had refused to champion the claims of the plaintiffs in *any* tribunal; refused to consider the error of dismissing the class action and the novel point whether a Law Board proceeding is an adequate remedial substitute for a judicial class action under Rule 23.

REASONS FOR GRANTING WRIT

I.

Plaintiffs are denied their right of access to the U.S. District Court to enforce legal remedies exclusively vested in that court by the Seventh Circuit's unwarranted extension of the "exhaustion-of-administrative-remedies" rule.

The Seventh Circuit summarily disposes of the instant case as if the dispute were solely a matter of interpreting the collective bargaining agreement (and the side-letter) of May 27, 1968, governing severance and transfer pay of Pullman car porters and holds that such dispute is exclusively a matter of administrative adjudication by a Public Law Board under Sec. 3 of the Railway Labor Act (45 USC §153 First).

The Seventh Circuit's brief judgment order overlooks material allegations of the complaint which necessarily remove the instant controversy from the cited section of the Railway Labor Act and make it a matter cognizable only in a U. S. District Court.

Thus, the complaint charges the Union officials with a breach of their duty of fair representation and of collaborating with the Pullman Company in a common law conspiracy to deprive plaintiffs and the class of their severance pay rights under the collective bargaining agreement. If plaintiffs were permitted to prove that the side-letter interpretation of May 27, 1968 was in fact secret and its contents withheld from the sleeping car porters who were made acquainted only with the collective bargaining agreement itself, this circumstance standing alone would support the allegation of unfair representation.

The complaint also charges the Union officials with unfair discrimination in processing the severance pay claims of some sleeping car porters of the Union but not of all Union members, including the class plaintiffs, and that it was futile to call upon the Union officials to take the matter to the Public Law Board.*

---

*As the complaint points out (App. C., post), Pullman's notice of December 3, 1968 on its face squarely conflicted with the open agreement of May 27, 1968 and is an outright repudiation of the unqualified severance pay promised to the porters. It also confronted plaintiffs with a Hobson Choice: either the porters had to accept railroad jobs as the only way to become eligible for severance pay (with the risk of unemployment after Jan. 1, 1969) or of forfeiting their severance pay by taking a job with a railroad. The Dec. 3rd notice had these consequences—which the Court of Appeals totally ignores: (a) The notice removed any prior options the porters had whether to take a job after January 1, 1969; (b) the notice came so late in the proceedings that it effectively precluded any administrative relief under the 30-day rule; (c) it was issued *unilaterally* by Pullman in an effort to obtain enough porters for the railroads (who were Pullman Company stockholders); (d) millions of dollars in separation pay had already been paid out by Pullman under the May 27, 1968 Agreement without the qualification contained in the December 3rd notice—(and the Union does not disclaim credit for those payouts); (e) the notice by its terms was directed to *all porters* throughout the country; (f) in answer to Interrogatory 40 Pullman admitted that pursuant to the May 27, 1968 agreement $4,471,381.12 was paid to some 819 individuals, 120 of which again receiving their payments as early as August 1968—without the requirement imposed later by the December 3 notice. [In short, both Pullman and the Brotherhood were participating in the discrimination of which the plaintiffs here complain.] (g) In answers to Interrogatories 57 and 58, Pullman admits that separation payments made to porters were billed by Pullman as operating expenses to the railroad—i.e., that Pullman was acting as agent for the railroads in the course of which agency it eventually forced plaintiffs to take jobs with those railroads and then maintained that the plaintiffs had thereby forfeited their separation payments.

Where the complaint, as in the instant case, expressly pleads a breach of the duty of fair representation and details supporting facts indicating that the allegation is not frivolous and where additionally the complaint charges a common law conspiracy between the Union officials and the employer, there is present much more than a "dispute between an employee or group of employees and a carrier or carriers growing out of . . . the interpretation or application of agreements concerning rates of pay, rules or working conditions" which the Seventh Circuit erroneously holds is referable to the administrative machinery of the Railroad Adjustment Board. (App. A, p. 6).

The factual situation in *Andrews* v. *Louisville and Nashville Ry. Co.*, 406 U.S. 320, cited by the Seventh Circuit (App. A. p. 5), is totally dissimilar to the instant case. There the plaintiff raised only a question of wrongful discharge by his employer and in no way involved any question of unfair Union representation or conspiracy.

II.

The Seventh Circuit's judgment is in direct conflict with the decisions of this Court in Glover v. St. Louis-San Francisco Ry. Co.; Czosek v. O'Mara, and other cases.

The District Court initially granted the motion of defendant Pullman to dismiss the complaint as to it on the ground that the Court lacked "subject-matter jurisdiction in that primary jurisdiction is vested in the National Railroad Adjustment Board . . .; that even if the Court has jurisdiction, the complaint fails to state a claim upon which relief can be granted."

But a motion of the Union defendants to dismiss on the same grounds was overruled and their motion for summary judgment was denied. Without analysis and with no reason cited, the Court of Appeals states:

> "We have also examined the lengthy complaint and conclude that it failed to state a claim for relief against the unions. The complaint did not show that the plaintiffs resorted either to internal union remedies or to the remedies provided by Section 3 of the Railway Labor Act, or that the plaintiffs sought and were denied the union's services and assistance in processing any claim on their behalf." (App. A. p. 6).

It is submitted that the District Court was correct in sustaining the cause of action against the international and local unions, that the complaint pleaded sufficient facts to show the futility of seeking internal union remedies or the assistance of union services in processing the claims of the plaintiffs. On this point the gratuitous holding of the Court of Appeals is not only contrary to the record, but in conflict with the decisions of this Court.

Given the allegations of the complaint that the Pullman Company and the Union conspired to defraud the sleeping car porters of their rights to severance pay under the collective bargaining agreement of May 27, 1968, the charge that the plaintiff's own bargaining agent did not fairly represent the men, but discriminated against them in a hostile manner and colluded and collaborated with the employer to evade the payment of severance pay due the plaintiffs, it is manifest that the issues raised by the complaint are much broader than the type of disputes which must be referred to the National Railroad Adjustment Board.

It has been repeatedly held by this Court that this Board has no jurisdiction over a dispute arising from a breach of duty by a union to fairly represent all employees in the

bargaining unit. *Steele* v. *Louisville & Nashville Ry. Co.*, 323 U.S. 192. Such an action is properly lodged against the unions in the Federal Courts. *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210, 213.

Nor does the Railroad Adjustment Board have jurisdiction to adjudicate a claim of conspiracy between an employer and a union whereby the latter is alleged to act in concert with the employer to defraud the employees of money due from the employer. In such circumstances, and especially where it appears that pursuit of contractual or administrative remedies would be futile, resort to the Federal Courts is the *sole* remedy available to the plaintiffs. *Glover* v. *St. Louis-San Francisco Ry. Co.*, 393 U.S. 324; *Czosek* v. *O'Mara*, 397 U.S. 25.

In *Glover* the plaintiffs filed a complaint in the U. S. District Court alleging that their union and railroad employer practiced discrimination against them pursuant to a "tacit understanding" and a "*sub rosa* agreement" between the railroad and certain union officials to keep plaintiffs from acquiring higher pay jobs. (*cf.* the allegations in the instant complaint of the "*sub rosa*" side-letter agreement interpreting the collective bargaining agreement of May 27, 1968). Reversing the Court of Appeals which had sustained the District Court's judgment of dismissal, the Court speaking through Mr. Justice Black, said at p. 523:

> "It is true, as the respondents here contend, that this court has held that the Railroad Adjustment Board has exclusive jurisdiction under §3 First (i) of the Railway Labor Act . . . to interpret the meaning of the terms of a collective bargaining agreement. We have held, however, that §3 First (i) by its own terms, applies only to 'disputes between an employee or group of employees and the carrier or carriers.' *Conley* v.

> *Gibson,* 355 U.S. 41, 44 . . . In the present case . . . the petitioner sought relief not only against their union, but also *against the railroad,* and it might at one time have been thought that the jurisdiction of the Railroad Adjustment Board remains exclusive in a fair representation case to the extent that relief is sought against the railroad for alleged discriminatory performance of an agreement validly entered into and lawful in its terms. * * *
>
> "This view, however, was squarely rejected in the *Conley* case . . . Finally, the Railroad Adjustment Board has no power to order the kind of relief necessary even with respect to the railroad alone, in order to end entirely abuses of the sort alleged here. The Federal Courts may therefore properly exercise jurisdiction over both the Union and the railroad." (Emphasis added.)

The Court in *Glover* dismissed a contention similar to one made in the case at bar that the complaint should have been dismissed because the petitioners failed to exhaust their remedies under their collective bargaining agreement, the union constitution and the Railway Labor Act. Citing *Vaca* v. *Sipes,* 386 U.S. 71, this Court said in language pertinent to the case at bar, at p. 524:

> "And the reasons which prompted the court [in Steele v. Louisville & Nashville RR. Co., supra.] to hold as it did about the inadequacy of a remedy before the Adjustment Board apply with equal force to any remedy administered by the union, by the company or both, to pass on claims by the very employees whose rights they have been charged with neglecting and betraying. Here the complaint alleges in the clearest possible terms that a formal effort to pursue contractual or administrative remedies would be absolutely futile."

The unequivocal right of union members to pursue their union in the courts for breach of their duty to fairly represent is also enunciated in *Czosek* v. *O'Mara,* 397 U.S. 25, and is ignored by the judgment of the Seventh Circuit in its holding that the complaint herein fails to state a claim for relief against the Unions. In *Czosek* the court said at p. 27:

> ". . .' Where the courts are called upon to fulfill their role as the primary guardians of the duty of fair representation,' complaint should be construed to avoid dismissals . . . and surely, it is beyond cavil that a suit against the Union or breach of its duty of fair representation is not within the jurisdiction of the National Railroad Adjustment Board or subject to the ordinary rule that administrative remedies should be exhausted before a resort to the courts. *Glover* v. *St. Louis-San Francisco Ry. Co.* [supra]; *Conley* v. *Gibson* [supra] . . . The claim against the Union defendants for the breach of their duty of fair representation is a discreet claim quite apart from the right of the individual employees expressly extended to them under the Railway Labor Act, to pursue their employer before the Adjustment Board."

In the case at bar the complaint explicitly alleges collusion between the Unions and Pullman in respect to the plaintiffs' severance rights. There would be no necessity, therefore, for separating the cause of action in the District Court from the "discreet claim" against the employer.

The instant cause of action alleging conspiracy by the defendants in depriving plaintiffs of fair representation and nondiscrimination in respect to their collective bargain-

ing agreement was properly lodged in the United States District Court, as numerous cases now establish. *

The source of a cause of action by union members against their labor union for a failure of fair representation is the Railway Labor Act which condemns such conduct as unlawful.

As the Court said, in *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen,* 323 U.S. 210, at p. 213:

> " 'The extent and nature of the legal consequences of this condemnation though left by the statute to judicial determination, are nevertheless to be derived from it and the Federal policy which it has adopted.' *Ditrick* v. *Greaney,* 309 U.S. 190. * * * The case is therefore one arising under a law regulating commerce of which the Federal courts are given jurisdiction by 28 U.S.C. §41 (8)".

Section 41(8) of Title 28 is now Sec. 1337. The recognition of exclusive Federal jurisdiction over controversies involving the duty of fair representation as first announced in *Steele* v. *Louisville & N.R. Co.,* 323 U.S. 192 and the companion case of *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen,* 323 U.S. 210, has consistently been followed through *Glover* v. *St. Louis-San Francisco Ry. Co.,* 393 U.S. 324 [supra] and *Czosek* v. *O'Mara,* 397 U.S. 24 [supra].

---

* See *Rumbaugh* v. *Winifrede Co.,* 331 F. 2d 530 (4th Cir. 1964) (cert. den'd 379 U.S. 929; *Thompson* v. *Brotherhood of Sleeping Car Porters,* 367 F. 2d 489, 490 (4th Cir. 1966, ft. nt. 1); *Humphrey* v. *Moore,* 375 U.S. 335, 351, 355-6 (1964); *Thompson* v. *Brotherhood of Sleeping Car Porters,* 316 F. 2d 191 (4th Cir. 1963); *Cunningham* v. *Erie Ry. Co.,* 266 F. 2d 411, 414-417 (2nd Cir. 1959); *Richardson* v. *Texas N.O.R. Co.,* 241 F. 2d 230, 235-236 (5th Cir. 1957).

The judgment of the Seventh Circuit in the instant case, by the simple expedient of ignoring those decisions although cited to the Court, has refused to follow that principle.

III.

The decision of the Seventh Circuit is in conflict with those of other Circuits.

Not only is the instant judgment of the Seventh Circuit in conflict with decisions of this Court, but it is also at variance with those of other Circuits.

In *Cunningham* v. *Erie Railroad Co.*, 266 F. 2d 411 (2nd Cir. 1959), the court was confronted with an identical jurisdictional question as in the case at bar, and stated as follows (p. 414):

> "The jurisdiction of the District Court.
>
> "(1) In limine we face the question of jurisdiction. It is a fair inference that Cunningham bases his claim upon an alleged discriminatory discharge in violation of a right arising out of the Railway Labor Act, 45 U.S.C. §153, et seq. See: *Steele* v. *Louisville and Nashville RR* (1944) 323 U.S. 192 . . .; *Brotherhood of Railroad Trainmen* v. *Howard* (1952 343 U.S. 768 . . .; *Conley* v. *Gibson* (1957, 355 U.S. 41 . . .
>
> "*He asserts this claim against both the railroad and the Union.* Whether he is right or wrong, there is jurisdiction. 28 U.S.C. §§1331, 1337, even without diversity . . .
>
> * * *
>
> "The argument of the railroad is that the Adjustment Board alone is competent to decide questions such as a dispute between the parties here [citations omitted].
>
> * * *

> "A long line of Supreme Court cases, such as *Steele, Howard,* and *Conley,* above cited, and including also *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen* (1944) 323 U.S. 210 . . . and *Graham* v. *Brotherhood of Locomotive Firemen* (1949) 338 U.S. 232 . . . all construe the Railway Labor Act as requiring union representation to be exercised without 'hostile discrimination' toward any one group. *In none of these cases did the court give its approval to arguments such as are raised here, to the effect that the Adjustment Board alone was competent to adjudicate the claim. On the contrary, it was held that discrimination was not within the ambit of the power of the Adjustment Board . . .*"

The Second Circuit concluded its opinion as follows (p. 416):

> "In any event, it is perfectly clear that Cunningham claims to have some substandard right arising out of the Railway Labor Act, against both the Union and the Railroad. Whether he is right or wrong about this we hold that the District Court had Federal-questioned jurisdiction over *both* the Union and the Railroad." (Emphasis added).

See also: *Richardson* v. *Texas & N.O.R. Co.,* 242 F. 2d 230, 235-236 (5th Cir. 1957) and *DeBoles* v. *TWA Inc.,* 350 F. Supp. 1274, 1282-1283 (D.C.E. Pa. 1972) holding that where the focus of a complaint is hostile discrimination and unfair treatment dealt the plaintiffs by their union representatives, the Federal Court has jurisdiction over both the union and the employer, the District Court said at p. 1284:

> "The joining of the employer, TWA, does not alter the original character of the controversy. It is still a dispute primarily between employees and their Union, and the fact [t]hat the employer was joined to afford relief and that the dispute may incidentally involve construction or interpretation of the collective bargaining agreement, does not change the basic fact that the

Railway Labor Act does not authorize adjustment boards to hear an employee dispute against its Union."

IV.

Certiorari should be granted in exercise of this Court's supervisory powers to curb the excessive number of unpublished disposition orders entered by the Seventh Circuit under its local rule No. 28.

The instant judgment order of the Seventh Circuit is designated as an "unpublished order, not to be cited per Circuit Rule 28."* (App. A.)

As a means of lightening the burdens and expediting the business of the Court, the disposition of appeals by sum-

---

* Local Rule 28 of the Seventh Circuit in pertinent part provides:

"The Court may dispose of an appeal (1) by an order or (2) by an opinion which may be signed or per curiam.

"Orders shall not be published and opinions shall be published.

* * *

"Guidelines for Method of Disposition.

"Published opinions:

Shall be filed in signed or per curiam form in appeals which

(1) establish a new or change an existing rule of law;
(2) involve an issue of continuing public interest;
(3) criticize or question existing law; or
(4) constitute a significant and nonduplicative contribution to legal literature
  (a) by a historical review of laws;
  (b) by describing legislative history; or
  (c) by resolving or creating a conflict in the law.

"Unpublished orders:

* * *

(2) may be in writing and contain reasons for the judgment but ordinarily not a complete nor necessarily any statement of the facts, in appeals which subparagraph (a) are not frivolous but (b) present arguments concerning the application of recognized rules of law, which are sufficiently substantial to warrant explanation but are not of general interest or importance."

mary "unpublished orders" is salutary in conception but is greatly abused in practice. The device permits the Court to omit, skimp or slight the essential facts of a cause, to frustrate public accountability for the justice or soundness of the result and avoids not only the setting of citable precedent, but contrary to what the rule professes, slyly permits the avoidance of *stare decisis.*

The report of the Seventh Circuit for the year 1973 reveals the astounding statistic that 61.2% of all appeals disposed of by the Seventh Circuit for that year were by "unpublished orders".* Thus, it is represented by the Court that of the cases that come before it most have no "precedent value".

The vice and abuse of Circuit Rule 28 is exemplified in the instant case: The unpublished order omits entirely the essential facts upon which federal district court jurisdiction was predicated—namely allegations in the complaint of unfair union representation, the crucial fact that the side letter was *sub rosa,* the common law conspiracy between the employer and the Unions to deprive the class plaintiffs of their severance pay rights under the collective bargaining agreement, and other circumstances in support of plaintiffs' plea that resort to administrative remedies would have been futile.

The unpublished order conceals the Seventh Circuit's refusal to follow this Court's decision in *Glover* v. *St.*

---

* *The Judicial Business of the United States Courts of the Seventh Circuit,* ANNUAL REPORT, 1973, pp. 19, 29.

The Report, in discussing the Court's "innovative" plan of disposition, states at p. 29:

> "The plan of the Seventh Circuit differs from some of the other circuits in two respects: First this Court does not allow orders to be cited . . . *The Court believes that it has authority to prevent citation,* but that it does not have authority to prohibit their publication . . ." (Emphasis added)

Louis-San Francisco Ry. Co., 393 U.S. 324, and *Czosek* v. *O'Mara*, 397 U.S. 25, which have sustained judicial remedies under essentially the same facts as pleaded in the instant complaint. The unpublished order omits any explanation as to why those decisions are not germane.

The claims of former Pullman Company employees (other than the instant plaintiffs) and their alleged rights under collective bargaining agreements made in relation to the phase-out of Pullman service and take-over by numerous railroads, has arisen on prior occasions in the Seventh Circuit. *Manzardo* v. *The Pullman Company* (7th Cir. No. 72-1891, unpublished order Dec. 12, 1973; cert. den. May 28, 1974, 73-1482); *Westermayer* v. *The Pullman Co.* (7th Cir. No. 73-1801 unpublished order April 25, 1974).

A guideline exposition in a published opinion as to why the Pullman employee litigants could not proceed in the Federal District Court under the principles of *Glover* and *Czosek* cases would have been extremely helpful to the instant and former litigants, who are numerous and would have spared all parties the cost and inconvenience of futile appeal. Indeed, it appears that the Seventh Circuit has failed to observe its own criteria for the disposition of appeal by the published opinions and could have prevented "duplicative" and repeated efforts to seek redress in the courts in claims arising under the severance pay provisions of the Pullman collective bargaining agreement.

In the circumstances the supervisory powers of this Court should be exercised to reduce excessive and inappropriate use of the unpublished order employed by the Seventh Circuit under its local Rule 28.

CONCLUSION

For all of the foregoing reasons, it is respectfully prayed that a Writ of Certiorari issue to the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

ARTHUR D. SCHAFFER
ROBERT J. WIEFERICH
JOHN A. MCELLIGOTT
Attorneys for Petitioners

Of Counsel:
SIDNEY Z. KARASIK

APPENDICES FOLLOW

APPENDIX

APPENDIX

APPENDIX A

("Unpublished Order" not to be cited per Circuit Rule 28.)

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued April 15, 1974

May 8, 1974.
Before
Hon. WALTER J. CUMMINGS, *Circuit Judge*
WILBUR F. PELL, JR., *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*

JEROME F. MILES and BERNICE MOORE,
Individually and on behalf of all
others as a class similarly situated,
Plaintiffs-Appellants,

No. 73-1515 *vs.*

THE PULLMAN COMPANY, a corporation;
BROTHERHOOD OF SLEEPING CAR PORTERS,
an International Union; and
CHICAGO DIVISION OF BROTHERHOOD OF
SLEEPING CAR PORTERS,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois,
Eastern Division.
No. 71 C 3121
JULIUS J. HOFFMAN, *Judge.*

ORDER

In 1947, The Pullman Company was ordered to divest itself of its sleeping car business which resulted in its stock

ownership by fifty-two railroads. Under a Uniform Services Contract approved by the Interstate Commerce Commission, Pullman offered its sleeping and parlor car services to any railroad desiring such service and most of the passenger-carrying railroads in the country availed themselves of the service. Under the service contract, any railroad could discontinue the service at any time, either absolutely or by taking over the operation of the cars from Pullman. Moreover, the Transportation Act of 1958 authorized the Interstate Commerce Commission to permit discontinuance of passenger train operations by interstate rail carriers. Consequently, throughout the years Pullman continued to lose its sleeping car business in increasing volume up to 1968 due to discontinuance of passenger service and due to railroads performing the service themselves. *The Pullman Co.* v. *Order of Railway Conductors and Brakemen*, 316 F.2d 556, 557 (7th Cir. 1963); *Westermayer* v. *The Pullman Co.*, 360 F.Supp. 631, 633 (N.D. Ill. 1973), *aff'd.*, 7th Cir., No. 73-1801, April 25, 1974. At the end of 1968, Pullman went out of the sleeping car business altogether, turning over its remaining business to the respective rail carriers for whom the service was then being performed.

The present case was brought by two individuals, each purporting to represent a class, against the Pullman Company and against the international and local Brotherhood of Sleeping Car Porters, seeking severance pay. Plaintiff Jerome F. Miles was a porter employed by Pullman since 1944. He transferred to Seaboard Railroad in January 1969 and retired from Seaboard in 1971. Plaintiff Bernice Moore was the widow of Frank M. Moore who had been a porter employed by Pullman for over twenty-eight years until his death on March 27, 1969.

On August 17, 1972, the distrct court granted Pullman's motion to dismiss the complaint as to it, the court finding that exclusive jurisdiction to determine the controversy was vested in the National Railroad Adjustment Board by 45 U.S.C. § 153. On March 19, 1973, the court ruled that the case could not be maintained as a class action against the unions. On April 10, 1973, the court dismissed the complaint of the two individual plaintiffs against the unions for want of prosecution. This appeal followed.

On December 17, 1963, the Brotherhood of Sleeping Car Porters entered into an agreement with the National Railway Labor Conference, known as the "Wolfe-Randolph Agreement," numbered paragraph 1 of which provided:

> In the event a Carrer exercises its right under the contract existing between the Pullman Company and the Carriers to discontinue using the services provided by the Pullman Company, sleeping car porters and attendants who otherwise would lose their jobs as a result of the Carrier's withdrawal from participation in Pullman activities will be permitted to follow their work to the extent the Carrier requires the use of sleeping car porters and attendants.

On May 27, 1968, the Brotherhood of Sleeping Car Porters entered into an agreement with Pullman, providing for separation pay on a graduated scale, depending upon length of service and age.

In a letter agreement also dated May 27, 1968, the Brotherhood and Pullman agreed as follows:

> With reference to Agreement dated May 27, 1968, in regard to job protection and separation allowances, it is understood and agreed that Pullman employees who have already or may in the future be employed by a

> railroad taking over its sleeping car service (even though they may have a furlough status with Pullman) shall not be entitled to payments of any kind under the above-mentioned agreement.
>
> The employees referred to in this letter of understanding are those taken over by railroads which ratified the Wolfe-Randolph Agreement of December 17, 1963.

The May 27, 1968 letter covered plaintiff Miles' situation exactly and would deny him any relief.

In regard to plaintiff Moore, the severance pay allowances provided for in the May 27, 1968 agreement apply only to "protected employes" (the agreement throughout spells employee as "employe"). Article II, section 2 provides that "[a]n employe shall cease to be a protected employe in case of his . . . death. . . ." Inasmuch as plaintiff Bernice Moore in her affidavit attached to the complaint alleged that her deceased husband was employed by the Pullman Co. . . . "until his death," her situation was also covered exactly by the agreement, which would deny her any relief. Moreover if there was any question as to whether Moore was employed at the date of his death, that possibility was foreclosed by the affidavit of the president of Pullman, attached to Pullman's motion to dismiss, alleging that Moore had been treated by Pullman as employed by it as of March 29, 1969, thereby entitling his estate to nontaxable insurance proceeds of $6,000, whereas if Moore had ceased being employed by Pullman prior to his death, he would have been entitled instead to only $5,048.50 under the terms of the May 27, 1968 agreement.

These facts would support the district court's dismissal of the complaint as to Pullman except that it has been argued by plaintiffs that the May 27, 1968 letter, which foreclosed Miles' relief, conflicted with the provisions of the May 27, 1968 agreement.

The letter of May 27 was an interpretation of the May 27 agreement by the international union and Pullman. The final paragraph of the May 27 agreement provided that "[a]ny dispute involving the interpretation of any terms of this agreement . . . may be submitted by either party for final and binding resolution in accordance with the provisions of Section 3 of the Railway Labor Act, amended."

Section 3 of the Railway Labor Act, 45 U.S.C. § 153, First (i), provides in part that "disputes between an employee or group of employees and a carrier or carriers growing out of . . . the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . may be referred by petition of the parties or by either party to the appropriate division of the [National Railroad] Adjustment Board. . . ."

In *Andrews* v. *Louisville & Nashville Railroad Co.*, 406 U.S. 320, 324 (1972), the Supreme Court affirmed the dismissal of a railway employee's complaint for failure to exhaust the remedies provided by 45 U.S.C. § 153, First (i), stating:

> Thus petitioner's claim, and respondent's disallowance of it, stem from differing interpretations of the collective-bargaining agreement. . . . His claim is therefore subject to the Act's requirement that it be submitted to the Board for adjustment.

Inasmuch as the complaint here did not allege any resort to the Board, the district court properly dismissed it in regard to Pullman.

The court dismissed the cause as it applied to the unions for want of prosecution. Although we cannot say that the court abused its discretion in view of the plaintiffs' de-

faults in regard to depositions and interrogatories and their failure to appear for trial, we have also examined the lengthy complaint and conclude that it failed to state a claim for relief against the unions. The complaint did not show that the plaintiffs resorted either to internal union remedies or to the remedies provided by Section 3 of the Railway Labor Act, or that the plaintiffs sought and were denied the unions' services and assistance in processing any claim on their behalf.

In view of our conclusions as to the district court's actions dismissing the cause against both Pullman and the unions, the class action question becomes moot.

The orders of August 17, 1972, March 19, 1973 and April 10, 1973, are affirmed.

AFFIRMED

APPENDIX B.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
May 28, 1974.

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*

JEROME F. MILLES AND BERNICE MOORE, etc.,
Plaintiffs-Appellants,

No. 73-1515 *vs.*

THE PULLMAN COMPANY, BROTHERHOOD OF SLEEPING CAR PORTERS, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois,
Eastern Division.
(71 C 3121)

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS ORDERED that the petition for rehearing in the above-entitled appeal be and the same is hereby DENIED.

APPENDIX C

Summary Of The Complaint and History of The Litigation

This was a class action, pursuant to Rule 23, FR Civ.P. filed by the plaintiffs individually and on behalf of all others "as a class who are similarly situated." The amount in controversy is alleged to exceed $1,000,000.00 and the requisite grounds for federal jurisdiction are pleaded.

The Complaint and attached exhibits appear at page 40, et seq. of the Record.

The Plaintiffs

Plaintiff Jerome F. Miles, was a Pullman car porter alleging that he and other Pullman car porters similarly situated did not receive severance, transfer or separation pay, as guaranteed them under a certain contract dated May 27, 1968, when the defendant Pullman Company Sleeping Car Service ended on December 31, 1968.

Plaintiff Bernice Moore is the widow of an eligible sleeping car porter, and she purports to represent other heirs who did not receive the severance, transfer or separation pay to which their decedents were entitled pursuant to said agreement.

The Complaint alleges the requisite class action elements: (1) that the members of the plaintiffs' class consist of approximately 1150 sleeping car porters and their heirs, and that, "joinder of all the members is impracticable"; (2) that there are questions of law and fact common to the class; (3) that the claims of the two named individual plaintiffs are "typical of the claims of the

class"; and (4) that the plaintiffs will "fairly and adequately protect the interests of the class." (Compl. 2-3)

The Complaint also divides the class plaintiffs into two sub-classes as follows:

> Group A plaintiffs consisting of all sleeping car porters in 1968 employed by The Pullman Company between May 27, 1968 and December 31, 1968, who did not receive severance, transfer or separation pay, when the company terminated its operations and service on the latter date;
>
> Group B plaintiffs consisting of the widows and heirs of men who were sleeping car porters on the roster of The Pullman Company between May 27, 1968 and December 31, 1968, and who did not receive severance, transfer or separation pay when the company terminated its sleeping car service on the aforesaid date.

The individual plaintiffs Jerome F. Miles and Bernice Moore are shown on the Complaint to be residents of Washington, D.C.

The Defendants

Defendant The Pullman Company is described as an Illinois corporation, which, until the end of 1968, operated its own Pullman cars throughout the United States, and was the employer of all the plaintiff sleeping car porters and all of the class plaintiffs other than Group B plaintiffs. The principal office of the defendant The Pullman Company is located at Chicago, Illinois. (Compl. 3-4).

Defendant International Union is an unincorporated association with an office and vice president located in Chicago, Illinois. The International carries on the activities of a labor union and has many hundreds of members throughout the United States.

The defendant Chicago Division of Brotherhood of Sleeping Car Porters, is described as an unincorporated association which is the agent of the defendant International Union and local division thereof, with its principal place of business located in Chicago, Illinois. (Compl. 4).

The Cause of Action

Prior to December 31, 1968, defendant The Pullman Company operated Pullman cars throughout the continental United States. At the relevant times, The Pullman Company was wholly owned by some 52 principal railroads of the United States. The Pullman Company employed sleeping car porters who were members of the defendant International Union. The plaintiffs as a class were employed as such sleeping car porters with practically identical duties throughout the country. In 1968, the number of such employees was approximately 1150. (Compl. 4).

On December 17, 1963, The Pullman Company and the Union entered into an agreement under which sleeping car porters were to be protected by transfers to railroads when the latter took over sleeping car services theretofore provided by The Pullman Company. The protection extended to employment (to the extent that the carriers required porters), equal salary, seniority rights and vacations. A copy of the agreement was attached as Exhibit B to the complaint and incorporated by reference. (Compl. 4-5).

Thereafter, according to the complaint, the Union and The Pullman Company conducted a long series of negotiations under the auspices of the National Mediation Board which culminated in a certain Memorandum of Agreement signed on May 27, 1968, and witnessed by two members of

the National Mediation Board. The Memorandum, attached as Exhibit C to the complaint, was incorporated by reference.

The Memorandum of Agreement provided for sleeping car porters' severance pay from their employer, The Pullman Company, under three conditions:

> (1) If in furlough status on November 13, 1967 and recalled prior to November 13, 1968, the separation allowance was to be paid on a formula based upon that year's days of work, divided by 365 days, and multiplied by the standard separation allowance in Article IV of the Agreement, which was based on total length of service and age;
>
> (2) A transfer allowance of $2,500.00 if a porter was transferred to a job with a railroad;
>
> (3) A separation payment for employees in active service on November 13, 1967, who were furloughed by The Pullman Company and resigned, based on years of service and age; the basic separation allowance being in excess of $8,000.00 for such a porter. (Compl. 5).

The Pullman Company was obligated thereby to make payments provided for in the Agreement. All of the class plaintiffs, represented by the individual plaintiffs, were informed of their severance pay rights and were given to understand that they would receive either $2,500.00 or at least $8,000.00 if The Pullman Company ceased to employ them. Attached to the complaint were affidavits of nine members of the class averring their understanding of the foregoing agreement.

The Complaint alleges that on May 27, 1968, the date of the published Agreement, the defendant The Pullman Company and the Union executed a private and clandestine letter agreement which, by its terms, squarely conflicted

with the provisions of the aforementioned Memorandum Agreement and provided that no payments of any kind would be made to "employees who have already or may in the future be employed by a railroad taking over its sleeping car service." The private letter of May 27, 1968 is attached as Exhibit E to the Complaint and incorporated by reference.

The letter, the contents of which were kept secret from the sleeping car porters, was under a Pullman Company letterhead signed by F. J. Boeckelman, Director of Employee and Labor Relations, was addressed to Mr. A. Phillip Randolph, International President, Brotherhood of Sleeping Car Porters, and said:

> "Dear Sir:
>
> "With reference to Agreement dated May 27, 1968, in regard to the job protection and separation allowances, it is understood and agreed that Pullman employees who have already or may in the future be employed by a railroad taking over its sleeping car service (even though they may have a furlough status with Pullman) shall not be entitled to payments of any kind under the above-mentioned agreement.
>
> "The employees referred to in this letter of understanding are those taken over by railroads which ratified the Wolfe-Randolph Agreement of December 17, 1963." (R. 112).

The letter was accepted by A. Phillip Randolph, International President of the Union.

The Pullman Company, maintaining that not enough sleeping car porters were applying for jobs with railroads for the take over of sleeping car service on January 1, 1969, took the position that unless a man applied for a transfer to a railroad and accepted a job if offered, he

would not be eligible for separation pay from The Pullman Company. A notice to this effect was posted by The Pullman Company. A copy of the notice dated December 3, 1968, is attached as Exhibit G to the Complaint and incorporated by reference.

The Complaint alleges that the notice of December 3, 1968, on its face, squarely conflicted with the Agreement of May 27, 1968, and with the assurances with plaintiffs had received in October 1968, both from their own International Union Officials and from The Pullman Company, of an option to receive separation pay or transfer pay.

The Complaint alleges that most of the class plaintiffs desired to resign and accept the $8,000.00 severance pay. The affidavits of certain sleeping car porters, attached as Exhibits D(1)-(9) to the Complaint so state. Nevertheless, the Union with certain exceptions, supported The Pullman Company's new position that the men had to first apply for railroad jobs to preserve their eligibility for the severance pay.

The Complaint alleges that the Union constantly warned sleeping car porters not to rely on severance pay rights and exhorted the men to apply for jobs with the railroads. The complaint alleges that the Union sent plaintiffs from railroad to railroad to seek employment in an effort to avoid the severance pay due them. Thus, when a doctor from one railroad failed to pass a plaintiff sleeping car porter at a physical examination, at the request of the Union the man was repeatedly re-examined by other doctors until hired, so that no severance pay would be due him. If the railroad to whom a porter applied for transfer had filled its needs, the railroad sent him—through his Union—to numerous other railroads for possible transfer. (Compl. 8).

In other instances the railroads continued Pullman car service for a short time and then abandoned such service, so that the plaintiffs who accepted transfer not only lost their jobs after a short period, but also lost their right to severance pay.

The complaint alleges that many of the plaintiffs were, after repeated applications to railroads at the urging of their Union, employed in positions with the railroads where they lost substantial benefits, earnings, seniority and desirable "runs".

The complaint alleges that the Union actively collaborated with the railroads, in these various devices to defeat the plaintiffs' rights to the $8,000 severance pay allowance from The Pullman Company. As a result, the complaint alleges, neither of the individual plaintiffs and none of the class they represent has received severance pay of any kind, although none of them were employed by defendant The Pullman Company after January 1, 1969. (Compl. 8).

The complaint alleges that the defendant Union has taken no effective action to secure such severance payments for plaintiffs nor to oppose the devices whereby The Pullman Company evaded its responsibilities to the Union members, including the plaintiffs here. (Compl. 8-9).

The complaint goes on to allege specific instances "illustrative of the collaboration between the defendant The Pullman Company, the Union and the railroads to deprive the plaintiffs, individually and as a class, of their severance payments." The complaint alleges that the detailed instances "represent the facts, with minor variations, which occurred as to each of the class plaintiffs represented by the plaintiff Jerome F. Miles, and that all of the said plain-

tiffs were thus deprived of severance payments to which they were entitled under the May 27, 1968 contract and were not fairly represented by the Union."

The complaint alleges that the Union had a duty and responsibility to secure more than $8,000.00 each in severance pay from The Pullman Company for its members, including the plaintiffs, and that The Pullman Company had an obligation to pay such severance pay to the plaintiffs under the contract of May 27, 1968. Plaintiffs were entitled to a fair and free choice as to whether they would accept individual severance pay of over $8,000.00 or continue as porters for the railroads when The Pullman Company ceased operations. (Compl. 16-17).

The gravamen of the complaint is that the plaintiffs were defrauded of their severance pay because of collusion between The Pullman Company and the Union and that this conduct constituted a "common law conspiracy". (Compl. par. 28).

Both The Pullman Company and the Union have conceded that the Union believed that the posted notice of December 3, 1968, abrogating or qualifying the severance pay commitment of the employer, conflicted with the collective bargaining agreement of May 27, 1968. (Ans. of Union, par. 13; Ans. of Pullman to Interrogatories 108 and 109, filed 5/18/72).

The complaint alleges that the officers of the defendant Union have a fiduciary obligation to the members of that Union, particularly with respect to representing them fairly in negotiations with their employer. It is alleged that the officers of the Union are trustees, obligated to serve the highest interests of their members; that they have failed to do so, but instead have collaborated with the

employer in transactions which resulted in harm and prejudice to their own members, depriving plaintiffs of severance benefits when The Pullman Company terminated its Pullman operations. (Compl. 18).

It is alleged that the Union officials failed in their fiduciary duties to the plaintiff members of the Union, have taken no action to advance their claims against The Pullman Company for severance pay, and have attempted to "cajole, threaten and intimidate those plaintiffs" who made claims for severance pay. (Illustrative of this allegation is the correspondence shown in Exhibit H attached to the complaint.)

It is further alleged that the defendant Union, in its representation of plaintiffs with respect to severance pay under the 1968 contract, discriminated against them. It is alleged that certain sleeping car porters who performed identical functions as the plaintiffs and who were represented by the defendant Union, as were the plaintiffs, were paid $8,000.00 or more in severance pay, although they were in the same situation as plaintiffs and the class who were denied severance pay, and that such payments were made by the defendant The Pullman Company, with full knowledge on the part of the defendant Union. The complaint then goes on to cite specific examples of such discriminatory payments, and makes reference to some of the affidavits attached as Exhibit D to the complaint.

The complaint alleges that the failure of the defendant Union to represent fairly the plaintiffs, individually and the class, and their condoning, if not actively approving, the discriminatory payments of severance pay to other members of the Union, "constitutes unfair representation by the Union, a gross inequity by The Pullman Company, and a violation of their fiduciary duties by the Union representatives." (Compl. 18-20).

No machinery was set up by defendants to provide for hearings or grievance proceedings by plaintiffs; the only provision was for submission of disputes under the Railway Labor Act, according to the final paragraph of the Agreement of May 27, 1968. But such procedure could be invoked only *after* a dispute arose and was not settled by The Pullman Company. The employees did not have 30 days between December 3, 1968, when the requirements of the railroads of applying for a job with a railroad, or transferring to one, was announced, and January 1, 1969, when the defendant The Pullman Company went out of business as their employer. Thus, within 28 days, i.e., by January 1, 1969, plaintiffs were required to decide whether they were eligible for severance pay, whether to apply for a job with a railroad, or whether to transfer to a railroad, with no administrative remedy. The Union repeatedly warned them that it could give them no assurance that they were entitled to severance pay and that they must make the decision at their own risk. (Compl. 22-23).

The Union letter of December 4, 1968, (Exhibit H attached to the complaint) indicated that whether a man was entitled to severance pay might take years to determine and that the outcome was unpredictable. With no procedures for grievances or forum for hearings available in the short period before the January 1, 1969 deadline, plaintiffs had no opportunity to invoke administrative measures or grievance procedures which would determine their eligibility for severance pay. The complaint alleges that the provisions in the last paragraph of the Memorandum of Agreement of May 27, 1968 for the resolution of disputes under Section 3 of the Railway Labor Act was thus rendered nugatory—by the time such procedures could have been invoked by plaintiffs it was defendant The Pull-

man Company's position that they would have forfeited their severance pay and be unemployed; the Union was unwilling to challenge this position. The absence of any fair administrative procedures for determining plaintiffs' rights to severance pay was an illegal deprivation of their property rights.

The complaint alleges that the letter agreement of May 27, 1968, the failure of the Union fairly to represent the plaintiffs in the negotiations leading to the Memorandum of Agreement dated May 27, 1968, the course of conduct pursued by defendants The Pullman Company, the Union and the railroads, and the concert of effort between said defendants and the railroads, were calculated to deprive the plaintiffs of all severance pay and constituted a common law conspiracy to defraud plaintiffs.

Plaintiff BERNICE MOORE alleged that she was the widow of a former sleeping car porter and that she represents the class of heirs of former sleeping car porters who were employed by or on the roster of The Pullman Company on December 31, 1968, but who died in 1969, 1970 and 1971, and who did not receive severance, transfer or separation pay in accordance with the Agreement of May 27, 1968. The complaint alleges that her late husband was fully entitled to over $8,000.00 in severance pay from The Pullman Company; that a check for that amount had in fact been drawn payable to her husband by The Pullman Company, but that when the company discovered that her husband had died in March, 1969, the defendant failed and refused to deliver the check, even though he had been eligible for said benefits on December 31, 1968 under the aforesaid Agreement.

The complaint then goes on to allege the cases of other widows and heirs of former Pullman porters who became eligible for the $8,000.00 severance pay allowance, but whose claims have not been recognized or for which payment has been refused. (Compl. 26-29)

The Prayer for Relief

In the prayer for relief, the complaint requests the court to declare the letter agreement of May 27, 1968 null and void; that the Court declare the rights of the plaintiffs, individually and as a class as against defendants under the Memorandum of Agreement of May 27, 1968; that the Court find that plaintiffs and the class whom they represent, including all Pullman sleeping car porters who were employed or on the Pullman roster between May 25 and December 31, 1968, are entitled to severance pay under the May 27, 1968 Memorandum of Agreement as of January 1, 1969, with interest to the date of judgment; that the Court find the defendants have breached the Memorandum Agreement of May 27, 1968: that the Court award actual and punitive damages: that a severance payment fund be created subject to the jurisdiction of the court and that a trustee be appointed by the Court to supervise such fund: that the plaintiffs have such other and further relief as the Court might deem just and proper, including just and reasonable attorneys' fees and expenses.

History of the Litigation

On August 17, 1972, the District Court dismissed the complaint against The Pullman Company on the ground that the plaintiffs had not exhausted their administrative remedies; that primary jurisdiction was vested in the National Railroad Adjustment Board; and that even if the

Court had jurisdiction, the complaint "fails to state a claim upon which relief can be granted." (Tr. 8/4/72 p. 3).

On the same date, the District Court denied the motion of the Labor Union for summary judgment and on November 22, 1972, the alternative motion of the Union to dismiss the complaint was denied.

On March 19, 1973, the Court dismissed the class action as not maintainable under Federal Rule 23 (Tr. 3/19/73, p. 5).

On April 10, 1973 the cause coming on for trial, the District Judge denied the motion of plaintiffs for a continuance on account of their illness and inability to come to Chicago from Washington. The complaint was therefore dismissed for want of prosecution. (Tr. 4/10/73, p. 5).

On appeal the plaintiffs sought review of the entire disposition of the case by the District Court.

SUPREME COURT, U. S.

No. 74-84

Supreme Court, U. S.
FILED
AUG 28 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

JEROME F. MILES and BERNICE MOORE, Individually and on behalf of all others as a class similarly situated,

Petitioners,

vs.

THE PULLMAN COMPANY, a corporation; BROTHERHOOD OF SLEEPING CAR PORTERS, an International Union; and CHICAGO DIVISION OF BROTHERHOOD OF SLEEPING CAR PORTERS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENT THE PULLMAN COMPANY

HAMILTON SMITH
JAMES E. BETKE
Attorneys for Respondent
The Pullman Company

Of Counsel:
McDERMOTT, WILL & EMERY
111 West Monroe Street
Chicago, Illinois 60603

The Scheffer Press, Inc.—(312) 263-6850

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-84

JEROME F. MILES and BERNICE MOORE, Individually and on behalf of all others as a class similarly situated,

Petitioners,

vs.

THE PULLMAN COMPANY, a corporation; BROTHERHOOD OF SLEEPING CAR PORTERS, an International Union; and CHICAGO DIVISION OF BROTHERHOOD OF SLEEPING CAR PORTERS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF RESPONDENT THE PULLMAN COMPANY

The petition for writ of certiorari should be denied.

The Seventh Circuit was right in holding that the district court did not have subject matter jurisdiction of the controversy.

It has been repeatedly held that the Railway Labor Act, 45 U.S.C. § 153, First (i), vests exclusive primary jurisdiction over disputes as to the interpretation or application of collective bargaining agreements in the National Railroad Adjustment Board. See, *Andrews* v. *Louisville & Nashville Railroad Co.*, 406 U.S. 320, 324 (1972); *Pennsylvania R. Co.* v. *Day*, 360 U.S. 548, 550-551 (1959); *Pickett* v. *New York Central Railroad*, 332 F.2d 968 (7 Cir., 1964); *Roberts* v. *Lehigh and New England Railway Company*, 323 F.2d 219 (3 Cir., 1963); *Switchmen's Union* v. *Ogden Union Railway & Depot Co.*, 209 F.2d 419 (10 Cir., 1954).

The petitioners argue that the crux of the complaint is that Pullman conspired with the unions to deprive the petitioners of the fair representation they were entitled to from the unions, and cite cases for the proposition that the federal courts do have jurisdiction of fair representation cases.

We do not deny that federal courts do have jurisdiction of fair representation cases. However, while the complaint does contain allegations of unfair representation, those allegations, as well as the other allegations of the complaint, are dependent upon the resolution of the dispute as to the proper interpretation and application of the collective bargaining agreement. Stated differently, the issues as to the interpretation of the May 27, 1968 collective bargaining agreement predominate. That being so, primary exclusive jurisdiction is vested in the National Railroad Adjustment Board. See, *Pickett* v. *New York Central Railroad*, 332 F.2d 968, 970 (7 Cir., 1964); *Thompson* v. *New York Central Railroad Company*, 361 F.2d 137, 139 (2 Cir., 1966).

Glover v. *St. Louis-San Francisco Railway Co.*, 393 U.S. 324 (1969), and *Czosek* v. *O'Mara*, 397 U.S. 25 (1970), are inapposite. They are not cases in which issues as to the interpretation of a collective bargaining agreement predominated.

The Seventh Circuit was also right in holding, for the reasons stated in its opinion, that the complaint failed to state a claim upon which relief could be granted as to Pullman.

Respectfully submitted,

HAMILTON SMITH
JAMES E. BETKE
Attorneys for Respondent
The Pullman Company

Of Counsel:
McDERMOTT, WILL & EMERY
111 West Monroe Street
Chicago, Illinois 60603

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-84

JEROME F. MILES AND BERNICE MOORE, ET AL.,
Petitioners,

v.

THE PULLMAN COMPANY, ET AL., Respondents

BRIEF FOR RESPONDENT UNION IN OPPOSITION

QUESTIONS PRESENTED

The questions presented for review as concerns the respondent Brotherhood are whether the court below erred in failing to find an abuse of discretion by the District Court in dismissing the cause for want of prosecution, or erred in finding that petitioners' complaint failed to allege a valid claim for relief against the Brotherhood.

STATEMENT OF THE CASE

The cause was dismissed by the District Court as it applied to the respondent Union, Brotherhood of Sleeping Car Porters (respondent Union or Brotherhood) for want of prosecution by the petitioners. The court

below found no abuse of discretion in such ruling in view of petitioners' defaults in regard to depositions and interrogatories, and their failure to appear for trial (App. pp. 5-6).[1]

The court below further found that the complaint failed to state a claim for relief against the Brotherhood, in that it did not show that the petitioners resorted either to internal union remedies or to the statutory remedies provided by Section 3 of the Railway Labor Act, 45 U.S.C. 153, or that petitioners sought and were denied the Brotherhood's services and assistance in processing any claim on their behalf.[2]

ARGUMENT

The decision below is clearly correct, and presents no question of federal law such as to justify granting the writ and review by this Court.

Contrary to the contentions of the petitioners, the decision below is not in conflict with *Glover*[3], and *Czosek*[4], or with any other relevant legal authority relied upon by petitioners.

The petitioners are shown to contend that they were unlawfully deprived of the benefits of a collective bar-

---

[1] Reference is to the Order of the court below printed as an appendix to the petition.

[2] The record before the court below contained the affidavits of Brotherhood officers, the deposition of a Pullman official, and the depositions of certain former Pullman porters who were contended to be part of the class allegedly represented by petitioners, and exhibits supporting such affidavits and depositions, furnishing facts relevant and material to the allegations of petitioners' complaint, and in support of the Brotherhood's motion for summary judgment.

[3] *Glover* v. *St. Louis-San Francisco R. Co.*, 393 U.S. 324.

[4] *Czosek* v. *O'Mara*, 397 U.S. 25.

gaining agreement negotiated by the respondents on May 27, 1968 (Pet. p. 3). Petitioners' contention is based upon the allegation that a "private, secret, side-letter agreement" between respondents, "of which plaintiffs were kept ignorant", was "designed to qualify and restrict the severance pay benefits promised" in the basic agreement executed by respondents on the same day (Pet. p. 4). The execution of the side letter (of understanding) by respondents constitutes the substance of petitioners' charge that the respondents "colluded and conspired" to deprive petitioners of separation allowances alleged to be payable to them, and for the collusory contention that the respondent Pullman Company breached the basic agreement, and that the Brotherhood breached its duty of fair representation owed to petitioners.

The court below characterized the letter of understanding as an interpretation (by the parties) of the basic agreement executed the same date, and noted aptly that the basic agreement provided that "any dispute involving the interpretation of any terms of that agreement" could be submitted for final and binding arbitration in accordance with the provisions of the Railway Labor Act.[5] *Andrews* v. *Louisville & Nashville Railroad Co.*, 406 U.S. 320, 324.

---

[5] The record before the court below included facts disclosing that the basic agreement and the letter of understanding were executed by officials of the respondents on the same date before a mediator appointed by the National Mediation Board, and submitted to the mediator for filing with the Board. The Executive Secretary of the Board filed an affidavit stating that the basic agreement and letter of understanding were promptly filed with the Board.

The record below contained also copies of essentially identical agreements and letters of understanding executed by Pullman with the collective bargaining representatives of other of its employees, the testimony by deposition of a Pullman official that copies of the

Petitioners' complaint (App. pp. 8-19) does not include any allegation that petitioners requested the Brotherhood's assistance in the processing of a claim for a separation allowance under the agreement. Absent such a request, the Brotherhood could not act for petitioners since the Railway Labor Act provides that an employee, such as each of petitioners, has the sole and exclusive right to designate his representative in processing a claim arising out of a dispute involving the interpretation and application of the terms of a collective agreement. *Elgin, Joliet & Eastern R. Co.*, 325 U.S. 711.[6]

The rulings in *Glover* and *Czosek, supra,* are clearly not relevant or material to the instant dispute. The District Court did not dismiss petitioners' complaint against the Brotherhood for lack of jurisdiction, but for want of prosecution, and that was the order affirmed by the court below.[7]

Whereas, the court below could have properly granted the Brotherhood's motion for summary judgment on the basis of its analysis of the record, its failure to

basic agreement and letter of understanding were distributed to each of petitioners; and the testimony by the depositions of former Pullman porters alleged to be part of the class represented by petitioners that each received a copy of the basic agreement and letter of understanding.

[6] Conversely, some seventeen (17) other former Pullman porters, not included as petitioners, did request the Brotherhood to file claims in their behalf, and such claims were processed through arbitration by the Brotherhood.

[7] A motion for summary judgment filed by the Brotherhood conceded that the District Court had jurisdiction to entertain the action against the Brotherhood for the alleged breach of its duty of fair representation, but urged that the material facts relevant to the dispute as to which there was no dispute, clearly showed that petitioners had failed to state a claim entitled to relief.

do so does not require this Court to disturb the judgment below, which is manifestly correct in its terms, and an appropriate resolution of the dispute.[8]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

EDWARD J. HICKEY, JR.
WILLIAM J. HICKEY
1125 15th Street, N.W., Suite 400
Washington, D.C. 20005
Counsel for Respondent Union

Of Counsel:

MULHOLLAND, HICKEY & LYMAN
1125 15th Street, N.W., Suite 400
Washington, D.C. 20005

September 3, 1974

Certificate of Service

I certify that service of this brief was made this day by the mailing, postage prepaid, of three (3) copies thereof to counsel for each party of record.

EDWARD J. HICKEY, JR.

September 3, 1974

[8] See *Montana-Dakota Utilities Co.* v. *Northwestern Public Service*, 341 U.S. 246, 249-250; *S.E.C.* v. *Chenery*, 318 U.S. 80, 88; *J. E. Riley Invest. Co.* v. *Commissioner of Int. Rev.*, 311 U.S. 55, 59; *Helvering* v. *Gowan*, 302 U.S. 238, 245-246.